Nos. 83-1065 and 83-1240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COUNTY OF ONEIDA, NEW YORK,
COUNTY OF MADISON, NEW YORK,
Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,
ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
and STATE OF NEW YORK,
Respondents,

STATE OF NEW YORK,
Petitioner,

v.

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ONEIDA INDIAN NATION OF WISCONSIN,
ONEIDA OF THE THAMES BAND COUNCIL,
COUNTY OF ONEIDA, NEW YORK and
COUNTY OF MADISON, NEW YORK,
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Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT ONEIDA OF THE THAMES BAND COUNCIL

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STATEMENT OF THE CASE

This action seeks to redress an historic and continuing wrong, the purported conveyance of land belonging to the Oneida Nation in violation of federal law. The respondents are the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames Band Council [hereinafter "the Oneidas"]. The complaint asserted a cause of action for trespass damages against the County of Oneida and the County of Madison, New York, for the years 1968 and 1969 [hereinafter the petitioners in 83-1065 are referred to as "the Counties"]. The Counties are the record owners of 871.92 acres of land which the Oneidas claim to own under federal law. No other defendants are sued and no other form of relief is sought.

The essence of the Oneidas' claim is that they have been wrongfully deprived of their land in violation of federal law. The complaint alleges that, in 1795, the State of New York acquired a tract of treaty-guaranteed Oneida land, including the area which is the subject of this suit, in violation of the federal Trade and Intercourse Act of 1793. 1 Stat. 329. That Act, which was purposefully designed to guarantee the security of Indian lands, invalidated any conveyance of Indian land not made by treaty pursuant to the authority of the United States. Since the 1795 transaction was not authorized or approved as required by the Act, the complaint alleges that the deed purporting to convey title was void and neither the State of New York nor the Counties, as successors, acquired any rights in the subject land. Thus, damages are sought for the unlawful use and occupancy of the subject land by the Counties.[1]

[1] The complaint also asserted that the subject land had been acquired by the State in violation of federal treaty guarantees. In view of the district court's ruling that the Counties are liable under the Trade and Intercourse Act, this claim was not reached. 434 F.Supp. 527, 537, n. 19 (N.D. N.Y. 1977) (Joint Appendix at 61a) (hereinafter "J.A.").

Initially, the District Court dismissed the claim for lack of federal question jurisdiction in 1971 and the Court of Appeals affirmed in a split decision. 464 F.2d 916 (2d Cir. 1972) (Lumbard, J., dissenting). This Court, in a unanimous decision, reversed, holding that federal question jurisdiction rests on the "not insubstantial claim" that federal law protects the Oneidas' legal interest in the subject land, apart from the application of state law. 414 U.S. 661, 667 (1974). On remand, the Counties filed third-party complaints for indemnification from New York State, petitioner in 83-1240 [hereinafter "the State"].

On the basis of uncontradicted evidence, the District Court found that the Oneidas had proven a *prima facie* violation of the Trade and Intercourse Act. 434 F. Supp. at 40 (J.A. at 68a). The court found that the subject land was part of the Oneidas' aboriginal land and was secured by three federal treaties. 434 F. Supp. at 538 (J.A. at 63a).

The court found that the 1795 conveyance was surrounded by irregularities. The State knew it was violating the Trade and Intercourse Act by negotiating with the Oneidas, and none of the individuals who signed was an Oneida chief and none was properly authorized to sign. 434 F. Supp. at 534-535 (J.A. at 57a). The court concluded that "[t]he proof clearly establishes that the United States never consented to the 1795 purchase." *Id.* The court also found that the Oneidas "never abandoned their claim to their aboriginal homeland and never acquiesced in the loss of their land, but have continued to protest its diminishment up until today." 434 F. Supp. at 541 (J.A. at 71a). As a result, the court held that under the terms of the Trade and Intercourse Act, the Oneidas' "right of occupancy and possession to the land in question was not alienated." 434 F. Supp. at 548 (J.A. at 84a). The Counties, as successors to the State, were held liable as trespassers.

After a trial on damages, the District Court awarded $9,060 in damages against Madison County and $7,634 in damages against Oneida County, plus annual interest at 6% (J.A. at 177a). The court allowed the Counties an offset for alleged good-faith occupancy. The court then held the State liable to indemnify the Counties for the full amount of the judgment.

The Court of Appeals affirmed all aspects of the District Court's ruling on liability but remanded for further proceedings on the calculation of damages. In an opinion by Senior Circuit Judge Lumbard, joined by Judge Mansfield, the court held that a common law right of action was available, and that a right of action is properly inferred from the Trade and Intercourse Act of 1793. The court rejected the Counties' defense of abatement, statute of limitations, non-justiciability and subsequent federal ratification. The judgment against the State was affirmed. Judge Meskill dissented.

SUMMARY OF ARGUMENT

The Oneidas have a cause of action under the federal common law for damages against the Counties for their unlawful use and occupation of Oneida land. The right of action, uniformly recognized by this Court and lower federal courts, is available to the Oneidas as owners of the subject land. Congress did not intend to preempt this right of action by the Trade and Intercourse Act of 1793 or any later Act, none of which addresses the question of remedies available to Indian tribes.

The Oneidas' title to the subject land is protected by § 8 of the Trade and Intercourse Act of 1793. It is clear from the relevant factors identified by the decisions of this Court that Congress intended § 8 to be enforceable through lawsuits by Indian tribes.

The Oneidas' right of action, under the common law and the statute, has not abated because the relevant pro-

vision of the Act has been in continuous force. Nor is this action barred by any state or federal statute of limitations. New York's statute of limitations is not properly borrowed as a matter of federal law because it would be inconsistent with the policies of the Trade and Intercourse Act and the federal policy of preserving Indian land rights.

The 1795 conveyance has not been validated by the Treaty of 1798 nor the Treaty of 1802. The enigmatic references to previously transferred lands cannot be regarded as plain and unambiguous approval of the 1795 conveyance.

This case does not raise nonjusticiable political questions. There has been no constitutional commitment of the Oneidas' claim to either Congress or the President. Neither has the Congress nor the President made a decision demanding the Court's unquestioning adherence.

ARGUMENT

In 1795, the Oneidas were dispossessed of 100,000 acres of their aboriginal land in violation of federal law. The Oneidas have worked persistently since then to correct that wrong, the economic and social effects of which are still felt today.

It is undisputed that the Oneidas owned the subject land by aboriginal right and treaty guarantee and that under federal law the validity of Indian land conveyances depends on proper authorization and approval by the United States in the manner established by the Trade and Intercourse Act. No one disputes the finding of the courts below that the Act of 1793 was violated by the 1795 conveyance. Thus the Counties, whose claim of ownership admittedly derives from the 1795 conveyance, never acquired valid title to the subject land, and the Oneidas are entitled to trespass damages for the Counties' wrongful occupation and use of Oneida land.

The Trade and Intercourse Act of 1793 was designed to prevent the kind of wrong by which the Oneidas lost their land in 1795. As the Court of Appeals noted, the circumstances surrounding the transaction were "fraught with irregularities." 719 F.2d at 525 (J.A. at 212a). The State of New York negotiated with certain Oneida individuals, who were not chiefs nor authorized to cede land, knowing that its actions violated the 1793 Act. The Oneidas received fifty cents per acre for the land, while the State sold much of it within two years for $3.53 per acre. 791 F.2d 529 (J.A. at 213a).

The Oneidas are not seeking to take advantage of a mere technical violation of a federal statute. The wrong is not, as the Counties suggest, that no federal commissioner was present at the 1795 transaction. Rather, the crux of the Oneidas' case is that the purported conveyance was not "made by a treaty or convention entered into pursuant to the constitution" and therefore is void. Trade and Intercourse Act of 1793, § 8. This case seeks to vindicate the longstanding federal policy to protect Indian land rights.

The Counties and State are asking in effect that this Court nullify the Oneidas' rights under the Trade and Intercourse Acts because of the supposedly catastrophic consequences of applying the law. This is a case of great importance and great consequence for thousands of Indians and non-Indians alike, but the consequences feared by the Counties and the State could arise, if at all, only from some future case, not this one. This case involves the issue of trespass damages against two governmental entities for the years 1968 and 1969. The right of the Oneidas to recover damages against individual owners has not been litigated and is therefore not established. More important, the availability of an ejectment remedy against the Counties or any other defendant has not been litigated or established. There is no doubt that these issues would be strongly contested, even if the Oneidas

are successful here. This cannot be an appropriate case in which to consider the issues of ejectment and the rights of individual owners. When and if those issues are litigated in some future action, then it may be appropriate for this Court to resolve them. It may never become necessary to decide these troubling issues.

Moreover, this case involves only the validity of the 1795 conveyance. The validity of the other Oneida land transactions with New York, alluded to by petitioners, is not at issue here and has not been litigated.[2]

The lower federal courts have shown a willingness to take into account the potential political and economic consequences of Indian land claims in formulating relief. In *Oneida Indian Nation of New York* v. *New York*, 520 F. Supp. 1278, 1295-1297 (N.D. N.Y. 1981), where recovery of a large tract of land is sought, the district court indicated that equitable considerations would partly determine the formulation of relief. In *Cayuga Indian Nation of New York* v. *Cuomo*, 565 F. Supp. 1297, 1308 (N.D. N.Y. 1983), the district court noted that, "should plaintiffs ultimately prevail, the utmost circumspection and restraint will be employed in fashioning an appropriate remedy."

Affirmance of the decision below would not result in the mass ejectment imagined by the Counties and the State, since the Oneidas have not sought such a result and would have no reason to seek such a result. Rather, respondents have always sought and still seek an agreed-upon settlement of these claims, approved by Congress. If this case were affirmed, the Oneida respondents would continue to seek that result because there would remain very powerful incentives to reach a negotiated settlement.

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[2] Oneida Indian Nation of New York v. New York, 691 F.2d 1070 (2d Cir. 1982), rests on a different legal theory and facts, namely that the alienation of Oneida land in 1785 and 1788 is void for violation of a congressional proclamation under the Articles of Confederation and a federal treaty.

In particular, Congrss could seek to extinguish the claims legislatively. This has been proposed in the past. *See, e.g.*, the bill entitled "The Ancient Indian Land Claims Settlement Act of 1982," H.R. 5494 and S. 2084, 97th Cong., 2d Sess. (1982).

Whether Congress has the power, consistent with the Constitution, to extinguish claims such as this has not been decided, but this Court and many other authorities have upheld such exercises of congressional power in other situations. *See, e.g., United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 408 (1980), quoting *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903); *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); N. Newton, "Federal Power Over Indians: Its Sources, Scope and Limitations," 132 *U. Pa. L. Rev.* 195 (1984). Respondents do not, of course, concede Congress' power to extinguish their claims and reserve the right to challenge the constitutionality of any such congressional action. Nevertheless, the very real and practical threat of adverse congressional action is a powerful incentive to seek an agreed-upon settlement rather than to press solely for judicial relief.

I. THE ONEIDAS HAVE A CAUSE OF ACTION UNDER FEDERAL COMMON LAW

The Court of Appeals held that the Oneidas have a federal common law right of action to enforce the Trade and Intercourse Act of 1793.[3] As owners of the subject land, the Oneidas have a common law right of action for damages against trespassers.

It is a fundamental legal principle under the common law that owners of land may pursue judicial remedies to enforce their property rights. As the Court explained

[3] The Counties and the State do not challenge the finding of the lower courts that the State of New York acquired the subject land in 1795 in violation of the Trade and Intercourse Act of 1793.

in *Green* v. *Biddle*, 8 Wheat. 1, 75-76 (1823): "The common law of England was . . . that a right of land, by that law, includes the right to enter on it when the possession is withheld from the rightful owner; to recover the possession by suit, to retain the possession, and to receive the issues and profits arising from it." Thus, as owners of their land, Indian tribes are entitled to pursue the full range of remedies provided by federal common law. The Court recognized as much in *Marsh* v. *Brooks*, 8 How. 223, 232 (1850), when it said: "That an action in ejectment could be maintained on an Indian right to occupancy and use is not open to question." If the interest of Indian tribes is sufficient to sustain a right of ejectment, surely a right of action for damages is likewise available.[4]

In its 1974 decision in this case, the Court recognized the legal principles on which a federal common law right of action is based. *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. 661 (1974). These principles are that Indian nations or tribes[5] have a legally enforceable "right of occupancy" in their lands which is "good against all but the sovereign" and can be lawfully extinguished, if at all, only by the United States. *Id.* at 667. Moreover, the Court reaffirmed the longstanding principle that "federal law now protects and has continuously protected from the time of the formation of the United States, possessory right[s] to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id.* at 677. The role of the federal

[4] The Counties assert that *Marsh* is not relevant because it originated in state court. Brief of Counties at 25, n. 12. That fact is not a valid basis on which to distinguish *Marsh*. The Court in *Marsh* relied upon Johnson v. M'Intosh, 8 Wheat. 543 (1823) and applied the principles of *federal* common law established in *Johnson*.

[5] Hereinafter these terms are used interchangeably.

common law in protecting these rights was expressly recognized: ". . . absent federal statutory guidance, the governing rule would be fashioned by the federal court in the mode of the common law." *Id.* at 674.

As the Court of Appeals noted, the Court's 1974 decision appears to recognize, though it does not hold, that a federal common law action is available in this case. 719 F.2d at 530 (J.A. at 216a). Significantly, it was not only the allegation of a right to possession and damages originating in federal law which led the Court in 1974 to find federal question jurisdiction. The Court noted that this case was distinctly different from cases where litigants have unsuccessfully sought to convert an ordinary ejectment action into a federal case by the "mere allegation of a federal source of title." 414 U.S. at 683-684 (Rehnquist, J., concurring). The federal policy of according legal protection to Indian land rights was the basis on which the Court distinguished this case from the ordinary ejectment action.

The Court's 1974 decision follows a long line of decisions recognizing that Indian tribes have legally enforceable rights in their lands. In *Johnson* v. *M'Intosh*, 8 Wheat. 543, 574 (1823), the Court acknowledged Indian tribes to be "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." Again in 1835, the Court made clear that the interest of Indian tribes in their land is a legal right, noting that the right of occupancy is "as sacred as the fee simple of the whites." *Mitchel* v. *United States*, 9 Pet. 711, 746 (1835). As against third parties, then, legal interests in Indian land are "accorded the protection of complete ownership . . . ." *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946).

The Oneidas assert a present-day federal common law right of action for trespass on their land in 1968 and 1969. There is abundant modern legal authority recog-

nizing this common law action. This principle was affirmed by the Court in *United States* v. *Santa Fe Pacific Ry. Co.*, 314 U.S. 339 (1941), where a common law right of action for an accounting of all "rents, issues and profits" was upheld against trespassers on land which Indians still owned. As Felix Cohen, the preeminent authority on federal Indian law, has noted: "Ordinary trespass remedies are available to Indian tribes to prevent trespasses upon their land and to recover damages for injuries arising out of such trespasses." F. Cohen, *Handbook of Federal Indian Law*, 524 (1942).

In recognition of the enforceability of Indian land rights, the lower federal courts also have consistently upheld the right of Indian tribes to maintain actions for trespass damages. In *Edwardsen v. Morton*, 369 F. Supp. 1359, 1371 (D.D.C. 1973), the district court recognized that certain Alaskan Native villages had causes of action in trespass against third parties who entered Indian land under color of invalid title or of unlawfully issued permits prior to the Alaska Native Claims Settlement Act of 1972. The same right is upheld in *Inupiat Community of the Arctic Slope* v. *United States*, 680 F.2d 122, 128-129 (Ct. Cl. 1982), *cert. denied*, 103 S. Ct. 299 (1982) (the right to sue for trespass is one component of the set of rights Indian title provides). *See also United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976) (granting damages remedy against railroad which failed to acquire lawful easement or right-of-way over the reservation). The rationale of these cases appears to be that a common law right of action is available in order to effectuate the policy of the United States of protecting Indian land rights. *See United States* v. *Santa Fe Pacific Ry. Co.*, 314 U.S. 339, 345 (1941). That rationale applies with equal force to this case.

For their argument that there is no federal common law right of action here, the Counties rely primarily on

the alleged absence of any federal common law before 1842. Brief of Counties at 25, n.20. Whatever the state of the law in other areas may have been, it is beyond dispute that Indian land rights from the beginning were governed by principles of federal law, which were often judge-made. The unique federal nature of Indian land rights was recognized as early as 1823 in *Johnson* v. *M'Intosh*, 8 Wheat. 543 (1823). Regarding the question of whether grants of land by certain Indian nations to a private individual superceded a later sale by the same nations to the United States, the Court had this to say about the source of the governing law:

> . . . as the title to lands, especially is, and must be, admitted, to depend entirely on the law of the nation in which they be; it will be necessary, in pursuing this inquiry, to examine, not simply those principles of abstract justice . . . which are admitted to regulate, in a great degree, the rights of civilized nations, . . . ; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

8 Wheat. at 572. *See also Worcester* v. *Georgia*, 6 Pet. 515 (1832) (principles of federal common law applied, along with treaties, statutes and the Constitution, in holding that the laws of Georgia may not extend over the territory of the Cherokee Nation).

II. THE ONEIDAS' COMMON LAW RIGHT OF ACTION HAS NOT BEEN PREEMPTED

Relying on *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ("Milwaukee II"), the Counties and the State argue that the Oneidas' common law right of action was preempted by the Trade and Intercourse Act of 1793. Emphasizing unrelated provisions regarding land, trade and criminal jurisdiction, the Counties and the State argue that the 1793 Act was as comprehensive as the

statute found to preempt federal common law in *Milwaukee II*.

In determining a question of preemption, the relevant inquiry is whether the legislative scheme "speaks[s] directly" to the question of common law remedies—if so, whether Congress has "affirmatively and specifically" enacted rules governing the issue. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1977). In this case, the question is whether Congress in the 1793 Act spoke directly to the question of remedies available to Indian tribes to enforce the Act. Because the Act does not address that issue, the Court of Appeals correctly held that the Oneidas' common law remedies are not preempted. 791 F.2d at 531 (J.A. at 218a).

None of the reasons which led the Court to find preemption in *Milwaukee II* apply to the Trade and Intercourse Act. *Milwaukee II* considered the effect of the Federal Water Pollution Control Act Amendments of 1972 on the federal common law of nuisance regarding interstate water pollution. The Court held that the common law remedies had been preempted because Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. at 317. The Court relied on the abundant evidence in the legislative history that Congress intended to establish a comprehensive, all-encompassing water pollution scheme with detailed and elaborate enforcement mechanisms. 451 U.S. at 317, 318.[6]

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[6] The statute in *Milwaukee II* prescribed in great detail the remedies available to the federal government or in private suits, established notice requirements as a condition to filing suit, established a range of monetary penalties for violations, contained special jurisdictional provisions, and established an elaborate administrative apparatus to administer the new program. The Court noted that Congress viewed the 1972 Amendments as a total restructuring of existing water pollution legislation. 451 U.S. at 318.

By contrast, the relevant provisions of the Trade and Intercourse Act of 1793 are far less comprehensive and detailed.[7] Nor is there any evidence in the legislative history, comparable to that relied on in *Milwaukee II*, to suggest that Congress intended the 1793 Act to preempt common law remedies.

The strongest indication that Congress did not intend to preempt common law remedies is the fact that the Act says nothing at all about the question of what remedies would be available to Indian tribes. Nor did the Act address the question of enforcement of the Act by States or land companies. There are many other areas not addressed in the Act. For example, there is no provision for regulating or redressing the unlawful removal of natural resources from Indian lands. Nor does the Act cover the question of rights-of-way or the building of roads through Indian territory. It contains no provision governing hunting or the grazing of livestock on Indian lands.

In short, Congress did not enact a comprehensive scheme concerning Indian land. Inferring an intent to preempt the common law is particularly inappropriate when the statutory scheme is so simple and when enforcement mechanisms are so rudimentary. By recognizing a common law right of action for damages, the Court would not be "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. at 625.[8]

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[7] Only two provisions concern rights in Indian land. Section 5 imposed a small fine and imprisonment for settling on Indian lands and authorized the President to remove persons unlawfully settling on Indian lands. Section 8, the provision at issue in this suit, prohibited the acquisition of Indian lands without the authority and approval of the United States and imposed a fine of $1,000 and imprisonment on any person attempting to acquire Indian lands without such authority.

[8] The Counties argue that the Court has found preemption in statutes which were "far less imposing" than the 1793 Act, citing

None of the Trade and Intercourse Acts enacted after 1793 can be read to have preempted the common law right of action. None addresses the question of remedies available to Indian tribes, and none enacts a comprehensive regulatory and remedial scheme concerning Indian land rights.

Apart from the narrow scope of the statutes, there is additional evidence that Congress intended to preserve the common law remedies. In 1822, Congress amended the 1802 Trade and Intercourse Act to provide that "[i]n all trials about the right of property in which Indians shall be a party on one side, and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title . . . ." Act of May 6, 1822; 3 Stat. 683; 25 U.S.C. § 194. This provision has been construed to include Indian tribes. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 665-66 (1979). Thus, Congress plainly contemplated that common law rights of action would be available to enforce Indian land rights. If Congress had, as the Counties and State claim, preempted all common law actions in 1793, the 1822 Amendment appears to have been unnecessary.

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) (Death on the High Seas Act) and Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981). Counties' Brief at 30. Those cases are readily distinguishable. Although the statute in *Mobil Oil Corp.* did not address every issue of wrongful-death law, it did address the question of the measure of damages so thoroughly that an intent to preclude supplemental damages remedies could easily be inferred. By contrast, the Trade and Intercourse Act of 1793 did not directly address the question of a right of action at all. *Northwest Airlines, Inc.* was not strictly a preemption case. There the question was whether the Court should fashion a federal common law right of action which did not exist previously. The Court refused to do so, partly because Congress had enacted "a comprehensive legislative scheme including an integrated system of procedures for enforcement." 451 U.S. at 97. Again, the comprehensive nature of the statutes determined the Court's understanding of Congress' intent.

III. THE ONEIDAS HAVE A RIGHT OF ACTION UNDER THE TRADE AND INTERCOURSE ACT OF 1793

The Oneidas also have a right to sue implied in the 1793 and later Trade and Intercourse Acts. It is clear, considering all the relevant factors identified by the decisions of this Court, that Congress intended § 8 of the Trade and Intercourse Act to be enforceable through lawsuits by Indian nations and tribes.

In determining whether a cause of action is implied in a federal statute, the key inquiry is "the intent of Congress when it enacted the statute in question." *Daily Income Fund, Inc.* v. *Fox*, —— U.S. —— 104 S. Ct. 831, 839 (1984). The relevant factors, as elaborated by the Court are: a). the state of the law and the legal context at the time of the legislation. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378 (1982); *Cannon* v. *University of Chicago*, 441 U.S. 667, 698-699 (1979); b). the identity of the class for whose particular benefit the statute was passed; c). the legislative history; d). the purpose of the statute; e). the traditional role of the states, if any, in affording the relief sought; f). the existence of express statutory remedies adequate to serve the legislative purpose. *Daily Income Fund, Inc.* v. *Fox*, —— U.S. ——, 104 S. Ct. 831 (1984); *California* v. *Sierra Club*, 451 U.S. 287 (1981); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975).

A. The State of the Law and Legal Context

In determining congressional intent, "the initial focus must be on the state of the law at the time the legislation was enacted." *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 378. The analysis of the intent of Congress in enacting the Trade and Intercourse Act of 1793 "must take into account its contemporary legal context." *Cannon* v. *University of Chicago*, 441 U.S. at 698-699.[9]

[9] The requirement to take into account the contemporary legal context is part of the analytical framework adopted by the Court in Cort v. Ash, 422 U.S. 66 (1975). *See* Cannon v. University of Chicago, 441 U.S. at 698-699.

That Congress intended section 8 of the 1793 Act to be enforced through civil suits by Indian tribes is readily apparent from the legal context of that day. At the time the statute was enacted, it was well established as a general proposition that a right of action was available to any person who suffered injury by reason of a violation of a statute. Numerous authorities establishing and applying this rule are discussed by Justice Stevens in his concurring opinion in *California* v. *Sierra Club*, 451 U.S. at 300, n.3. Thus, in 1793, federal courts generally inferred a right of action whenever the plaintiff could show that the statute conferred rights or special benefits on a class of persons of which he was a member. This common law practices explains why Congress seldom, if ever, provided expressly for private rights of action in statutes during that period. Since Congress would have understood that a right of action would be available, it was unnecessary to spell it out in the statute itself. As the Court observed in *Cannon* v. *University of Chicago*, 441 U.S. at 696-697, "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law."[10]

The Counties and the State suggest that Congress could not have intended that a private right of action would be available because at the time, they claim, federal courts lacked jurisdiction over suits by tribes and, in any event, tribes lacked capacity to sue. Brief of Counties at 20-21, n.18; Brief of State at 23-24. This argument is erroneous on several legal and historical grounds.

First, the dispositive factor here is Congress' perception of the state of the law, not whether Congress cor-

[10] This is particularly true in the case of Indian legislation, as the Court has recognized: "[Indian statutes] cannot be interpreted in isolation but must be read in light of the common notions of the day and assumptions of those who drafted them." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

rectly perceived the state of the law. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 378, n.61 (1982). Because of the state of the law in 1793 and the years following, Congress could not reasonably have perceived that federal courts lacked jurisdiction or that tribes lacked capacity to sue.

Before the decision in *Cherokee Nation* v. *Georgia*, 5 Wheat. 1 (1831), it would have been reasonable to assume that Indian nations could invoke the original jurisdiction of the Court as a "foreign state" under article III of the Constitution. Indeed, Chief Justice Marshall observed in *Cherokee Nation* that Indian nations had "been uniformly treated as a state, from the settlement of our country." 5 Wheat. at 11. Congress was no doubt aware of the status of Indian nations as states[11] and may well have perceived them as sufficiently foreign to the United States to permit suits under the original jurisdiction of the Supreme Court. In *Cherokee Nation*, Justice Thompson, dissenting, noted that from 1775 to the time of the case, the executive and legislative branches had treated Indian tribes as sovereign nations which were foreign in the sense of being under a different government. 5 Wheat. at 57.

Furthermore, Section 11 of the Judiciary Act of 1789 gave federal courts original jurisdiction "of all suits of a civil nature at common law or in equity where . . . an alien is a party." 1 Stat. 73. This provision conferred jurisdiction over suits by aliens against citizens of the states. *Hodgson* v. *Bowerbank*, 4 Cranch 303 (1809). Indians were aliens, not citizens, unless citizenship had been acquired by treaty or statute. F. Cohen, *Handbook of Federal Indian Law*, 153-156 (1942). There were no such treaties or statutes at the time the 1793 Act was enacted. At least before *Cherokee Nation* in 1831, Con-

[11] Treaties, approved by the Senate and ratified, were the usual means for dealing directly with Indian nations or tribes, and the Trade and Intercourse Acts required that future land transactions be by treaty entered into pursuant to the Constitution.

gress may well have viewed this provision as a basis for federal court jurisdiction for suits by Indian tribes.[12]

Moreover, it is entirely possible that Congress understood that state courts would be open to entertain suits by Indian tribes. As Felix Frankfurter has noted, claims arising under the Constitution, laws and treaties of the United States were litigated, "in the first instance [in] state courts, reserving, however, through the famous twenty-fifth section of the First Judiciary Act, review by the Supreme Court when a state court had denied a claim of federal right." F. Frankfurter, "Distribution of Judicial Power Between the United States and State Courts," 13 *Cornell L. Q.* 449, 507 (1928). Under federal supremacy principles, state courts were obligated to apply and enforce federal law when federal claims were presented. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 340 (1816). Thus, state courts were available to hear suits by tribes to enforce federal rights, including rights under the 1793 Act. *See, e.g., Coleman* v. *Doe*, 12 Miss. 40 (1844) (an Indian whose title to a section of land has vested by reason of the Dancing Rabbit Creek Treaty may bring an ejectment action and recover possession). Congress surely must have been aware of this fact when it enacted the Trade and Intercourse Acts.[13]

Nor is it likely that Congress thought Indians and Indian tribes lacked legal capacity to sue to enforce their

[12] Even after *Cherokee Nation*, federal courts continued to regard Indian tribes as "alien nations," if not strictly foreign. *See* Elk v. Wilkins, 112 U.S. 94, 99 (1884).

[13] The Court later specifically confirmed that state courts were available to hear claims based on federally protected Indian land rights. Henderson v. Tennessee, 10 How. 311, 323-324 (1850). Numerous examples of state courts adjudicating controversies involving Indian rights under federal law can be cited. *See, e.g.*, Fellows v. Blacksmith, 19 How. 366 (1858); New York ex rel. Cutler v. Dibble, 21 How. 366 (1858). As there had been no change in the relevant law, these decisions confirm and reflect the state of the law in 1790 and 1793.

rights.[14] While occasionally suits were specifically authorized by statute, *see, e.g. Penobscot Tribe of Indians* v. *Veazie*, 48 Maine 402 (1870), the prevailing view was that Indian nations and tribes had capacity to sue without specific authorization. As early as 1810, state courts recognized the legal capacity of tribes: "The [Indian] nation, by its chiefs in council, is to be presumed competent to judge of its rights, and to preserve them, and private purchases from the nation or tribe are declared void upon other grounds." *Johnson ex. dem. Gilbert* v. *Wood*, 7 Johns. 290 (N.Y. Sup. Ct. 1810). Likewise, in *St. Regis Indians* v. *Drum*, 19 Johns. 127 (N.Y. Sup. Ct. 1821), the court decided a suit brought by an Indian tribe involving a lease of land from the tribe to a non-Indian without questioning the capacity of the tribe to sue. *See also Blair* v. *Pathkiller's Lessee*, 10 Tenn. 361 (1830) (Cherokee Indian "has clearly a right to sue and recover" lands granted under a treaty); *Swartzel* v. *Rogers*, 3 Kan. 374, 377 (1865) (in partition action under state law, "if the subject matter be within [the court's] jurisdiction, the parties, whether Indians or white men, have the right to litigate about it therein").

[14] The Trade and Intercourse Acts were enacted in a legal climate in which the capacity of tribes to sue had long been recognized. Suits by tribes and individual Indians were not uncommon during the colonial period. In 1703, for example, the Mohegan Indians sued the colony in Connecticut in Crown tribunals over a fraudulent land cession. The case demonstrated that "the plaintiff tribe was recognized to possess the attributes of internal sovereignty sufficient at least to maintain and prosecute an action." J. Smith, *Appeals From The Privy Council From The American Plantations*, 418 (1950). In 1765, the chief of the Wappinger Indians of eastern New York sued on behalf of his tribe to recover tribal lands. Although the tribe lost the case on the merits, no question was raised regarding capacity to sue. O. Handlin and I. Mark, eds., "Chief Daniel Nimham v. Roger Morris, Beverly Robinson, and Pillip Philipse—An Indian Land Case in Colonial New York, 1765-1767," 11 *Ethnohistory* 193 (1964). In 1739, the Houssatonnoc Indians were granted an ejectment remedy by the Inferior Court of Common Pleas in Massachusetts against a non-Indian. Y. Kawashima, "Indian Reservations in Massachusetts," 13 Am. J. L. Hist. 46 (1969).

While there are apparently no federal cases during this early period specifically addressing the capacity of tribes to sue, the Court very early implicitly recognized such capacity by affirming the legal and political existence of tribes independent of statutory recognition. *See Worcester* v. *Georgia*, 6 Pet. 515, 559 (1832).[15]

In view of this contemporary and subsequent legal context, it cannot be said that Congress in 1793 believed that tribes lacked capacity to sue. The absence of reported suits to enforce violations of the 1793 Act was probably due not to any legal disability, but rather to enormous practical and cultural barriers. *See* R. Clinton and M. Hotopp, "Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims," 31 *Me. L. Rev.* 17, 46 (1978). The Counties and the State cite no contemporaneous judicial decisions nor any historical evidence which might suggest that Congress believed Indian tribes lacked capacity to sue.[16] Such an assumption is unsupportable.

B. The Identity of the Class for Whose Particular Benefit the Statute was Passed

The second question is whether the Trade and Intercourse Act of 1973 was enacted for the "especial benefit"

[15] More explicit recognition of this capacity came later. *See* United States v. Crawford, 47 F. 561, 571 (C.C. W.D. Ark. 1891) (Creek Nation could sue for money received for its use and benefit); United States v. Boyd, 68 F. 577, 581 (C.C. W.D. N.C. 1895) (noting that Eastern Band of Cherokee Indians have sued in their own name at least since 1875); Y-ta-tah-Wah v. Rebock, 105 F. 257, 259 (C.C. N.D. Iowa 1900) (in all cases involving federal questions, Indians have always been recognized as proper suitors before federal courts); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

[16] The soundness of the dicta in Jaeger v. United States, 27 Ct. Cl. 278, 285 (1892), so heavily relied on by the Counties, has been seriously questioned. *See* F. Cohen, *Handbook of Federal Indian Law*, 285, n. 169 (1942). Cherokee Nation v. Georgia, 5 Wheat. 1 (1831), did not declare a general incapacity to sue, but rather was based on the Court's understanding of the Framers' intent in adopting Article III of the Constitution.

of Indian tribes. *Cort* v. *Ash*, 422 U.S. at 78. "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California* v. *Sierra Club*, 451 U.S. at 294. This question is to be answered "by looking to the language of the statute itself." *Cannon* v. *University of Chicago*, 441 U.S. at 689.

The language of the Act plainly shows that Indian tribes are the intended beneficiaries of the land protection provisions. Section 8 provides: "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution. . . ." This language reveals an unequivocal intention to confer on Indian tribes special rights against unauthorized land conveyances.

A major purpose of the Trade and Intercourse Acts was to protect and guarantee Indian lands. The idea for a statute regulating Indian land transactions originated with President Washington and his Secretary of War, Henry Knox. F. Prucha, *American Indian Policy in the Formative Years*, 43-44 (1962). On July 7, 1789, Knox recommended that a law should be enacted recognizing that "Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not to be divested thereof, but in consequence of fair and bona fide purchases, made under the authority, or with the express approbation, of the United States.[17] *Ameri-*

[17] That same year, Congress expressed its intent to safeguard Indian rights by enacting a statute relating to the Northwest territories, declaring in Article 3:

> The utmost good faith shall always be observed towards the Indians: their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Act of August 7, 1789, 1 Stat. 50.

can State Papers, I *Indian Affairs*, 53 (1832). In explaining the newly enacted Trade and Intercourse Act, government agents strongly emphasized the protective purposes of its provisions.[18]

The Court confirmed this interpretation of the Act in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979), saying: "a major purpose of these acts as they developed was to protect the rights of Indians to their property."

[18] As Timothy Pickering explained to the Seneca Nation in November 1790:

> [The land alienation provision] is intended for the mutual advantage of the United States and of Indian tribes. In the past, some white men have deceived the Indians, falsely pretending they had authority to lease or purchase their lands; And sometimes they have seized on more lands than the Indians meant to sell them; again falsely pretending that those lands were comprehended within their purchase.

61 *Pickering Papers* 78A (Massachusetts Historical Society, microfilm edition)

A short time later President Washington reiterated to the Senecas the primary purpose of the new law:

> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. *The General Government will never consent to your being defrauded, but it will protect you and all your rights.* . . . But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in the future, you cannot be defrauded of your lands; [T]he United States must be present, by the agent, and will be your security that you shall not be defrauded in the bargain you may make. . . . That, besides the before mentioned security for your lands, you will perceive, *by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians.* . . . (emphasis added).

American State Papers, I *Indian Affairs*, 142 (1832).

See also Federal Power Commission v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960).

The fact that the Trade and Intercourse Acts were enacted for the special benefit of Indian tribes is entitled to considerable weight in discerning congressional intent. "[T]he right or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action." *Cannon* v. *University of Chicago*, 441 U.S. at 690, n.13.

The Counties argue that § 8 is solely a criminal provision which Congress could not have intended to be enforced through civil suits. Brief of Counties at 14. The presence of criminal penalties, however, does not negate the fact that section 8 imposes a severe civil sanction for violations of that section: namely that no acquisition of Indian land without the authority and the approval of the United States "shall be of any validity in law or equity. . . ." Because this provision regulates rather than prohibits the acquisition of Indian lands, it is not properly construed as a purely criminal statute. *See Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

In construing a statutory provision strikingly similar to § 8, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), the Court held that a right of action is properly inferred from the terms of the statute itself. In that case, § 215 of the Investment Advisers Act of 1940 provided that contracts whose formation or performance would violate the Act "shall be void . . . as regards the rights of" any person violating the Act or his successors in interest. 444 U.S. at 16-17. The Court held a private right of action was available because "[b]y declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." 444 U.S. at 18. The Court thus concluded that "when Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of

voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." 444 U.S. at 19. The same reasoning applies to the statute here.[19]

C. Legislative History

The legislative history of the Act also supports the finding that Congress intended there to be a cause of action to enforce § 8. As the Court of Appeals observed, the legislative history of the Act is "sparse and incomplete." 719 F.2d at 533. The absence of definitive legislative history, however, is not surprising since "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon* v. *University of Chicago*, 441 U.S. at 694.

The Counties emphasize the fact that there was no discussion of the question of whether Indians could sue to enforce the Act in the recorded legislative debate. Brief of Counties at 18-19. The absence of explicit consideration, of course, is not dispositive, as the Court has noted: "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on

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[19] A damages remedy for trespass to land is one of the "customary legal incidents" which follow from a statutory provision which voids agreements conveying land. *See* Bunch v. Cole, 263 U.S. 250 (1923).

The fact that the Court in *Transamerica* awarded only equitable remedies of rescission and restitution is not a tenable basis on which to distinguish it, as the Counties claim. Counties Brief at 14. The claim for damages there was based on § 206, not on § 215 which declared the voidness of contracts in violation of the Act. The Court held that § 206 could not provide the basis for a private right of action because it did not "in terms create or alter any civil liabilities," 444 U.S. at 19, and because of overwhelming evidence that Congress did not intend § 206 to be enforced through private damage suits. 444 U.S. at 20-22. Equally noteworthy is the fact that relief was limited to equitable remedies under § 215 because jurisdiction was expressly limited to "suits in equity." 444 U.S. at 19, n. 9.

its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18. Here, the absence of any discussion is explained by the fact that Congress in all likelihood assumed that Indian tribes would be permitted to sue to enforce the Act under the prevailing common law approach to statutory rights of action. *See* text above at 17.

Congress' intention to permit tribes to enforce the Act is plainly evident from the circumstances surrounding the enactment of the 1793 Act and subsequent acts. The genesis of the Trade and Intercourse Acts was the need to stabilize the deteriorating relations between Indian tribes and settlers on the frontier. Peace on the frontier was endangered by settlers seizing or acquiring lands in violation of treaty guarantees. F. Prucha, *American Indian Policy in the Formative Years*, 44-45.

To remedy the situation, Secretary of War Knox recommended that the rights of Indian tribes in their lands should be specially protected by the United States against alienation to anyone but the United States. This policy became the centerpiece of the Trade and Intercourse Act of 1790.

Soon after its passage, the Act was explained to Indian tribes by government officials. These speeches show unequivocally that President Washington, Secretary Knox and others understood that Congress intended Indian nations to have a right to sue in federal court under the Act to protect their lands. In response to complaints by the Seneca Nation about land matters, President Washington stated in early 1791 that these grievances were covered by the new law and that the Senecas had the right to sue:

> Hear well, and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d of October, 1784, excepting such parts as you may

> have since fairly sold, to persons properly authorized to purchase of you.
>
> You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. It appears, upon inquiry of the Governor of New York, that John Livingston was not legally authorized to treat with you, and that every thing that he did with you has been declared null and void, so you may rest easy on that account. But it does not appear, from any proofs yet in possession of the Government, that Oliver Phelps has defrauded you.
>
> *If, however, you have any just cause of complaint against him, and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.* (emphasis added)

American State Papers, I *Indian Affairs*, 139 (1832).[20]

Despite the legal guarantees in the 1790 Act, it proved to be largely ineffective in eliminating the causes of con-

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[20] Washington's speech was printed, communicated to Congress along with other documents on January 11, 1792, and signed by Washington, countersigned by Secretary of State Thomas Jefferson and Henry Knox "by the command of the President of the United States." *American State Papers*, I *Indian Affairs*, 142-143 (1832). The speech was also communicated widely to Indian tribes. *See* 60 *Pickering Papers* 78-80 (Massachusetts Historical Society, microfilm edition). Timothy Pickering provided copies of the speech to representatives of the Six Nations Confederacy in July, 1791 at Newton Point, New York.

The evidence that President Washington and other high governmental officials understood that the Trade and Intercourse Act could be enforced in suits by Indian nations and tribes is entitled to considerable weight. *See* Cannon v. University of Chicago, 441 U.S. at 701-703. In *Cannon*, the Court relied in part upon the understanding or interpretation of the statute by the Executive Branch to support the inference of a private right of action under § 901(a) of Title IX of the Education Amendments of 1972. The failure of Congress to disavow this understanding is evidence that Congress "at least acquiesces in, and apparently affirms, that assumption." *Id.* at 703.

flict between Indians and whites. F. Prucha, *American Indian Policy in the Formative Years*, 46 (1962). President Washington accordingly proposed new measures which he hoped would establish the rule of law in Indian land transactions and obviate the need to resort to force to enforce treaty guarantees. *Id.* These proposals were embodied in the Act of 1793. The new statute made violation of the land sales provision a criminal offense and authorized the President "to take such measures, as he may judge necessary, to remove" persons unlawfully settling on Indian lands. § 5. Thus, as the Court of Appeals observed, these new measures show a congressional intent "to provide maximum protection of Indian land. . . ." 719 F.2d at 534 (J.A. at 224a).

Further evidence that Congress intended the Trade and Intercourse Act to be enforced through civil suits by tribes is found in an 1822 amendment to the Act. This amendment provided:

> In all trials about the right of property in which Indians shall be a party on one side, and white persons on the other, the burden of proof shall rest upon the white person in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Act of May 6, 1822; 3 Stat. 683; 25 U.S.C. § 194. This statute has been held to apply to Indian tribes. *See Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 at 665-666 (1979). This section presupposes that a private right of action would be available to Indian tribes. Congress could not plausibly have intended to limit this provision to suits in which tribes were defendants since the sovereign immunity of tribes would have foreclosed that possibility. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). The more plausible construction of this provision is that Congress contemplated that tribes would be able to enforce the Act in court. Any other interpretation would render the provision substantially meaningless.

D. Statutory Purpose

The fourth factor in determining congressional intent is the issue of whether a private right of action is consistent with the underlying purpose of the statute. *California* v. *Sierra Club*, 451 U.S. at 293. In *Cannon* v. *University of Chicago*, the Court noted: "[a] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." 441 U.S. at 703.

That the Act was intended to benefit Indians has already been demonstrated. The more specific purpose was to protect Indian land against unauthorized conveyance in order "[t]o prevent the steady eating away at the Indian Country by individuals who privately acquired lands from Indians. . . ." F. Prucha, *American Indian Policy in the Formative Years*, 44 (1962). As this Court has observed, the "obvious purpose of that statute is to prevent the unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties except the United States, without the consent of Congress." *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). *See also Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653-664 (1979).[21]

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[21] Every court which has addressed the issue has concluded that the Acts were intended to protect Indian land against unauthorized transfers. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Congress' concern in the 1790 Act was "with providing effective protection for the Indians 'from the violence of the lawless part of our frontier inhabitants,'" quoting Seventh Annual Address of President Washington); Mohegan Tribe v. Connecticut, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) (the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers was one object of the Act's land provisions); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 697 (9th Cir. 1976) (Act intended to prevent steady diminution of Indian territory unless by public treaty); Joint Tribal Council

The inference of a right of action in favor of Indian nations or tribes is necessary and helpful to the accomplishment of this statutory purpose. The express remedies provided in the Act, particularly the removal of intruders' provision and the criminal penalties for unauthorized negotiations, were largely ineffective in protecting Indian land against unlawful acquisition. The leading scholar on the Trade and Intercourse Acts has concluded that ". . . the great illegal onrush of settlers onto the Indian lands . . . was usually so great that the United States was unable to enforce the intercourse acts with any complete success." F. Prucha, *American Indian Policy in the Formative Years*, 147 (1962). In particular, "[t]he procedure of moving the illegal settlers off became almost a game and was never completely effective." *Id.* at 163. Thus, if the Act were unenforceable by Indians, the purpose of the Act would be largely frustrated.[22] An implied right of action is not only consistent with the Act's purpose but necessary to make the guarantees of the Act effective.

Relying on *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the Counties argue that the purpose of the Act was to maintain peace on the frontier and that, even if an incidental purpose was to protect Indians, that purpose is not served by the finding of an implied right of action. Brief of Counties at 22. Although the maintenance of peace may have been one goal of the Act, as the circuit court in *Mohegan Tribe* concluded: ". . . there is no evidence

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of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975); Cayuga Indian Nation of New York v. Cuomo, 565 F.Supp. 1297, 1323-1324 (N.D. N.Y. 1983); Schaghticoke Tribe of Indians v. Kent School Corp., Inc., 423 F.Supp. 780, 784 (D. Conn. 1976); Narragansett Tribe v. Southern Rhode Island Development Corp., 418 F.Supp. 798, 803 (D. R.I. 1976).

[22] The right of Indian tribes to enforce the Act is particularly important since the decision of the United States to sue on their behalf is a discretionary one. *See* Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F.2d 1082 (9th Cir. 1972).

demonstrating that peace on the frontier and enforcement of treaty obligations were the *sole* purposes of the various Acts." *Id.* at 622 (emphasis in original). Moreover, the overwhelming evidence that the express remedies were ineffective undermines the argument that inferring a private right of action would disserve the purposes of the Act because it may dilute the enforcement process.

E. Federal Role in Enforcing Indian Land Rights: Absence of State Role

Inference of a private right of action is particularly appropriate here, because the protection of Indian land rights has traditionally been the exclusive concern of federal law. Inference of a right of action thus does not interfere with an area traditionally governed by state law. *See Daily Income Fund, Inc.* v. *Fox*, —— U.S. ——, 104 S. Ct. 831, 842 (1984). As the Court in its 1974 decision in this case held: "Once the United States was organized and the Constitution adopted, the tribal rights to Indian lands became the exclusive province of the federal law." *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. at 667 (1974). The Court described as "rudimentary propositions" the principles that Indian land rights are a matter of federal law and can be extinguished only with federal consent. *Id.* at 670.

F. Adequacy of Express Remedies to Serve the Legislative Purpose

The Counties argue that Congress could not have intended the Act to be enforced by Indian tribes because the remedies it provided were intended to be exclusive and, in fact, wre adequate to fulfill the congressional purpose. Brief of Counties at 16, 17, 23. The historical evidence shows, on the contrary, that the express remedies provided by the Trade and Intercourse Acts were entirely ineffective. *See* F. Prucha, *American Indian Policy in the Formative Years*, 147, 163 (1962). The only remedies concerning land are a light criminal penalty for negotiating or attempting to negotiate a treaty without

the authority of the United States (§ 8), a criminal penalty for unlawfully settling on Indian land (§ 5) and a provision authorizing the President to remove settlers (§ 5). Section 12 provided that "informants" could collect half of the fines imposed unless the United States instituted the prosecution. In view of these meager remedies, it is entirely unreasonable to impute to Congress an intent to preclude other remedies.

This Court rejected similar arguments in *Cannon* v. *University of Chicago*, 441 U.S. at 711, where it is observed that ". . . the Court has generally avoided this type of 'excursion into extrapolation of legislative intent' unless there is other, more convincing evidence that Congress meant to exclude the remedy" (quoting *Cort* v. *Ash*, 422 U.S. at 83, n.14). As a general rule, "[t]he creation of one explicit mode of enforcement is not dispositive of congressional intent with respect to other complementary remedies." *California* v. *Sierra Club*, 451 U.S. at 295, n.6.

The Counties offer no compelling reason to depart from the general rule. No legislative history or other evidence is cited to support the assumption that Congress meant these few remedies to be exclusive. By contrast, there *is* evidence that the Executive and Congress intended the Act to be enforced by Indian tribes and that the express remedies were inadequate. In *Cannon* v. *University of Chicago*, 441 U.S. at 705, the Court decided that a private right of action should be inferred because the statutory remedy was not adequate to provide effective protection.

No intent to exclude civil suits is shown in the structure of the legislative scheme.[23] Two consequences flow

[23] Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) does not compel a different conclusion. The enforcement mechanisms there were far more detailed and elaborate than those provided in the 1793 Act. The enforcement mechanisms included suits by the Administrator of the Environmental Protection Agency for compliance orders and civil penalties

from a violation of § 8 of the 1793 Act. The person or state negotiating the treaty with the Indian nation without authority from the United States is subject to a $1,000 fine and possible imprisonment. *United States* v. *Hunter*, 21 F. 615 (C.C. E.D. Mo. 1884). The more important consequence is that the land conveyance is declared to be "of no validity in law or equity." It is this civil sanction for which enforcement is sought by the Oneidas. To preclude Indian suits would practically nullify one of the legal consequences Congress provided in § 8.

In similar contexts, the Court and lower federal courts have refused to interpret express statutory remedies as exclusive of all other remedies. In *Ewert* v. *Bluejacket*, 259 U.S. 129 (1922), an Indian sued to cancel a deed conveying his allotment to a special assistant to the U.S. Attorney General on the ground that the conveyance violated a federal statute. The statute expressly provided a fine of $5,000 and removal from office as penalties for its violation. The Court held the conveyance void, and remanded for an accounting. 259 U.S. at 138. There was no suggestion that the criminal penalties barred other remedies which could be inferred from the terms of the statute.[24]

of up to $10,000 per day, suits by "any interested person" seeking judicial review of actions of the Administrator and suits by private persons for injunctions to enforce the statutes. 453 U.S. at 13-14. By contrast, the 1793 Act contained no express citizen suit provision, nor did it provide the government with such elaborate enforcement powers.

[24] *See also* United States v. Bougher, 24 Fed. Cas. 1205 (C.C.D. Ohio 1854), in which an informer suit provision in a federal statute regulating licensing of steamboat operators was found not to be the exclusive remedy because otherwise the enforcement of the statute would be "wholly inefficient"; Chin v. Darnell, 5 Fed. Cas. 634 (C.C.D. Ohio 1848) in which ejectment was granted where a conveyance of land was in violation of the Proclamation of Congress of 1783 and the Trade and Intercourse Acts.

IV. THE ONEIDAS' RIGHT OF ACTION HAS NOT ABATED

The Counties argue that all causes of action arising under the 1793 Act have abated because that Act was repealed by the Trade and Intercourse Act of 1796. Brief of Counties at 35-38. The Court of Appeals, relying on the fact that the pertinent provision of the 1793 Act "remains operative," properly rejected this argument. 791 F.2d at 537 (J.A. at 231a).

The common law rule of abatement is inapplicable. Principally a doctrine of criminal procedure, the rule provides that the repeal or expiration of a statute abated all prosecutions under it which have not proceeded to final judgment, unless the repealer expressly provides for the continuation of such prosecutions. *See Warden* v. *Marrero*, 417 U.S. 653 (1974). Here, however, there has been no repeal or expiration of § 8 of the 1793 Act. The statutory provision invalidating unauthorized Indian land conveyances has been in continuous force since 1790 with only minor changes.[25] Under these circumstances the abatement rule does not apply.

When a statute is "in terms repealed and simultaneously reenacted with changes, the amendatory or reenacting act becomes a substitute for the original . . . .[T]he

[25] Between 1790 and 1834, Congress enacted six trade and intercourse acts, each containing a land sales provision identical in substance to § 8 of the 1793 Act. Act of July 22, 1790, 1 Stat. 137 (§ 4); Act of March 1, 1793, 1 Stat. 329 (§ 8); Act of May 19, 1796, 1 Stat. 469 (§ 12); Act of March 3, 1799, 1 Stat. 743 (§ 12); Act of March 3, 1802, 2 Stat. 139 (§ 12); Act of June 30, 1834, 4 Stat. 729 (§ 12). The first four acts were temporary in nature with fixed dates for expiration. In each case, however, a new act was passed before the previous act expired. *See* F. Prucha, *American Indian Policy in the Formative Years*, 43-50 (1962). The Act of 1802, the first permanent act, was replaced by a new act in 1834 which also contained the land alienation provision and provided that the repeal of the 1802 Act "shall not effect [affect] any rights acquired, or punishments, penalties or forfeitures incurred" under that Act. 4 Stat. 729, 734, 829. The pertinent provision of the 1834 Act is now codified at 25 U.S.C. § 177.

better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption." *Great Northern Ry. Co.* v. *United States*, 155 F. 945, 948 (8th Cir. 1907), *aff'd*, 208 U.S. 452 (1908). This principle has been recognized by the Court. *See Steamship Co.* v. *Joliffe*, 2 Wall. 450, 458 (1864); *Bear Lake Irrigation Co.* v. *Garland*, 164 U.S. 1, 11-13 (1936).[26] Thus, the Oneidas' right of action is not affected by the fact that the 1793 Act was a temporary statute and was repealed by the 1796 Act.

The Counties further suggest that § 8 of the 1793 Act merely prevented enforcement of conveyances which violated the Act and that, as a result, those conveyances became enforceable after the repeal of the 1793 Act. Brief of Counties at 38. This reading of the Act is totally inconsistent not only with the language of § 8, but also with the intent of Congress to nullify absolutely all conveyances of Indian land except those specifically authorized and approved by the United States. To carry out this intent, the words "of no validity in law or equity" must be understood to mean such conveyances are void unless authorized by the United States. *See United*

[26] *Great Northern Ry. Co.* cannot be distinguished as the Counties suggest. The principle of statutory construction affirmed in that case did not depend in any way on the fact that the successor act repealed only those statutes in conflict with that act, nor did it depend on the abrogation of the common law abatement doctrine in 1871. Similarly, Steamship Co. v. Joliffe is not so easily dismissed. The decision there did not turn on the nature of the right impaired, but rather on Congress' intent to continue in force substantially all of the provisions of the original act. 69 U.S. at 458.

The authorities cited by the Counties do not support their abatement argument. Norris v. Crocker, 13 How. 429 (1851), principally relied on by the Counties, is readily distinguishable. *Norris* involved an action of debt, specifically authorized by the statute, to recover a penalty of $500 under a criminal statute which penalized interference with the recovery of a fugitive slave. The statute there was not reenacted nor were the operative provisions continued in force in the new act.

States v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976). It would be absurd to read the language to mean that such conveyances were void while the Act was in effect but became enforceable when the 1796 Act—evidencing an identical intention to prohibit unauthorized Indian land transactions—was enacted. As the Court has observed, "[n]o title can be held valid which has been acquired against law . . . ." *Stoddard* v. *Chambers*, 2 How. 284, 317 (1844).

V. THIS ACTION IS NOT BARRED BY ANY STATE OR FEDERAL STATUTE OF LIMITATIONS

The Court of Appeals correctly held that New York's statute of limitations does not bar this suit. State statutes of limitations and other state law delay-based defenses have uniformly been held inapplicable to suits to enforce Indian land rights. *See Ewert* v. *Bluejacket*, 259 U.S. 129 (1922); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956). In *United States* v. *Forness*, 125 F.2d 928, 932 (2d Cir. 1942), *cert. denied sub nom. City of Salamanca* v. *United States*, 316 U.S. 694 (1942), the court held that, because Indian land rights are exclusively the subject of federal law, state law cannot be invoked to limit the rights of Indians to their lands. Similarly, in *Catawba Indian Tribe of South Carolina* v. *South Carolina*, 718 F.2d 1291, 1300 (4th Cir. 1983), the court held that the Trade and Intercourse Act and the Supremacy Clause preempt the application of state statutes of limitation to Indian land claims.

Recognizing the overwhelming weight of the authority against the applicability of state statutes of limitations, the Counties and the State assert that New York's statute of limitations should be borrowed and applied as a matter of federal law. The Court of Appeals' rejection of this argument is supported by sound reasons of law and policy.

The Trade and Intercourse Act does not contain a limitations period, nor does any other federal statute ex-

pressly provide a limitations period applicable to this suit. "But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977). In particular, "[s]tate limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Id.* at 367; *see also Del-Costello* v. *International Brotherhood of Teamsters*, —— U.S. ——, 103 S. Ct. 1421 (1983), noting that state statutes of limitations are unsatisfactory vehicles for the enforcement of federal law when they are at odds with the purpose or operation of federal substantive law.

As the Court of Appeals recognized, the adoption of a New York statute of limitations is plainly inconsistent with the federal policies embodied in the Trade and Intercourse Act. That policy is to guarantee Indian land rights by preventing "unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress." *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). The application of a state statute of limitations would significantly undermine this policy of federal protection, as the Court of Appeals recognized, by permitting a violation of the Act to continue unremedied. 791 F.2d at 538. (J.A. at 232a).[27]

The borrowing of state law here would also frustrate the strong federal policy of maintaining uniform national rules governing disposition of Indian land. As this

[27] The Counties' argument that subjecting Indian claims to state statutes of limitations would not be inconsistent with the policy of the Act because the United States could sue on the tribe's behalf ignores the fact that such a suit would be entirely discretionary. *See* Rincon Band of Mission Indians v. Escondio Mutual Water Co., 459 F.2d 1082 (9th Cir. 1972). Thus, the Court of Appeals' concern about violations of the Act going unremedied is entirely justified. In fact, the United States declined to prosecute this action on behalf of the Oneidas.

Court recognized in 1974, Indian rights to land are "the exclusive province of the federal law" and are extinguishable "only by the United States." *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. at 667. If Indian tribes are subject to varying limitations periods, depending on the location of the land, this policy of federal supremacy and uniformity would be defeated.

In *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), the Court approved the adoption of state substantive law where "there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests." 442 U.S. at 673. Here, on the contrary, adoption of state law would effectively destroy Indian property rights.

The rationale of *Ewert* v. *Bluejacket*, 259 U.S. 129 (1922) also precludes the adoption of state statutes of limitations. There, the Court refused to apply rules of limitation which would "give vitality to a void deed" and bar the rights of Indians in lands subject to statutory restraints on alienation. 259 U.S. at 138. Because application of New York's statute of limitations would similarly give vitality to a conveyance which is declared void by federal law, that statute cannot be borrowed.

The Court of Appeals also reasoned that borrowing state law would be inconsistent with the federal interest in treating Indian tribes as favorably as the United States, which would not be subject to state statutes of limitations in these circumstances.[28] *See United States*

[28] The Counties and the State argue that disparity of treatment between the United States and Indian tribes would be justified in this regard because of the so-called guardian-ward relationship. Brief of Counties at 33-34; Brief of State at 31-32. The Court has held, however, that the scope and nature of the respective powers under the so-called guardian-ward or trust relationship are defined solely by statute, treaty or perhaps executive order. United States v. Mitchell, 445 U.S. 535 (1979). Neither the Counties nor the State has identified any statute, treaty nor executive order which requires the disparate treatment for which they argue.

v. *Minnesota*, 270 U.S. 181, 196 (1926). *United States* v. *Minnesota* does not justify different rules of limitation for tribes and the United States when tribes sue to enforce their land rights. In that case, the fact that the United States could sue and the tribe could not was not the result of the statue of the tribe. Rather, the tribe could not sue because of the State's immunity from suit. 270 U.S. at 195. Today, even that bar to the assertion of Indian rights by the tribe would not exist. *See Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070, 1080 (2d Cir. 1982).

The Court of Appeals also looked to 28 U.S.C. § 2415 for guidance in determining whether to borrow state statutes of limitations. This Court need not decide whether § 2415 applies to actions brought by tribes themselves since even if it does apply, this action would not be barred. 791 F.2d at 538 (J.A. at 233a). The Court of Appeals' holding that at the very least this suit should be regarded as timely if a similar suit by the United States would be timely, is consistent with the legislative history of § 2415, which demonstrates a concern for the preservation of historic Indian trespass claims to land. *See Capitan Grande Band of Mission Indians* v. *Helix Irrigation Dist.*, 514 F.2d 465, 469-70 (9th Cir. 1976), *cert. denied*, 423 U.S. 874 (1976).

Section § 2415 also precludes the adoption of state law as the federal rule of decision here because it is "an explicit legislative policy cutting across state interests." *Board of Commissioners* v. *United States*, 308 U.S. 343, 352 (1939); *Brooks* v. *Nez Perce County, Idaho*, 670 F.2d 835, 837-38 (9th Cir. 1982). Congress has determined a limitations period for damage suits by the United States on behalf of Indian tribes, and the Court of Appeals properly looked to that policy for guidance in determining that adoption of state law would be inconsistent with the federal interest in permitting tribes to sue on their own behalf.

The question of whether some other doctrine of limitations, such as laches, adverse possession or bona fide

purchaser for value, would bar this suit need not be reached by this Court. Although these defenses were raised by the Counties in the district court, they were abandoned on appeal and have not been urged or briefed here. In any event, the applicability of these defenses is foreclosed by prior decisions of the Court. As the Court held in *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922): ". . . the equitable doctrine of laches . . . cannot have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions."

Because the District Court held that laches did not apply, it did not undertake the detailed factual inquiry necessary to determine whether the Oneidas unreasonably delayed in filing this suit. As a result, the factual record before the Court is inadequate for a fair determination of this issue. There are many factual issues not addressed by the District Court which would have a crucial bearing on the question of laches, such as the economic, cultural and social reasons why the suit was not filed earlier. Therefore, even if the doctrine of laches were found to apply, it would be necessary to remand this case for consideration of the factual and historical issues bearing on laches.

VI. THE 1795 CONVEYANCE IS NOT VALIDATED BY THE TREATIES OF 1798 AND 1802

The Counties and the State argue that the 1795 conveyance at issue here is valid because the United States implicitly ratified it in the federal treaties of 1798 and 1802. Brief of Counties at 39-44; Brief of State at 32-36. This argument is contrary to the longstanding principles adopted by the Court in *United States* v. *Santa Fe Pacific Ry. Co.*, 314 U.S. 339 (1941), that any extinguishment of Indian land rights by Congress must be by "plain and unambiguous action," 314 U.S. at 346, and that extinguishment of Indian land rights will not be "lightly implied," 314 U.S. at 354. *See also Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). As the Court of Appeals in this case noted, this standard applies

to the alleged approval of the 1795 conveyance, since "ratification" would also extinguish the Oneidas' title to the subject land. 791 F.2d at 539. (J.A. at 236a).

Judged by this standard, neither the 1798 Treaty nor the 1802 Treaty[29] can be found to have approved or validated the 1795 conveyance. The 1798 Treaty refers to an earlier conveyance as "the last purchase from them." (J.A. at 36a). The 1802 Treaty merely refers to "other lands heretofore ceded" by the Oneida Nation (J.A. at 39a). In view of the circumstances of the making and approval of these treaties, neither of these cryptic references can be regarded as a "plain and unambiguous" approval of the 1795 conveyance. In neither treaty is there any explicit reference to the 1795 conveyance or its validity. There is no assurance that the federal commissioners who negotiated the treaties nor the Senate were even aware that the boundary lines referred to were those drawn by the 1795 conveyance.[30] Thus, there is no evidence that the relevant language in

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[29] It may be doubted whether the Treaty of 1802 was properly ratified and effective. It is the President's act of approval after the Senate gives its consent which constitutes ratification under the Constitution. Art. II, § 2, para. 2; L. Henkin, *Foreign Affairs and the Constitution*, 130 (1972); Reiff, "The Proclaiming of Treaties in the United States", 30 *Am. J. Int'l L.* 63, 66-69 (1936). For example, the Senate consented to the Creek Treaty of 1789 and thereafter advised the President "to ratify the same." 1 *Journal of the Executive Proceedings of the Senate* 61, 62 (1829 ed.). Although the Senate consented to the 1802 Oneida Treaty, there is no evidence that the President then ratified it. Significantly, two early compilations of laws and treaties fail to include the 1802 Treaty among the list of ratified treaties, while the 1798 Oneida Treaty is included in both. *See Bioren and Duane's Laws of the United States 1789-1815* (1815); *Message on Indian Land Titles*, House Document No. 74, 17th Congress, 1st Sess., 7-8 (February 20, 1822). Although the absence of any record of express presidential ratification may not be conclusive, it raises a substantial doubt whether the treaty ever became effective and whether the United States intended to validate the 1795 conveyance in the 1802 Treaty.

[30] Neither the Counties nor the State suggest that the Senate was shown maps or other evidence that would indicate awareness of the 1795 transaction.

both treaties is anything more than a reference to previously drawn boundary lines inserted for the purpose of identifying the lands ceded in each treaty.

Neither the Counties nor the State cite any historical or other evidence which would suggest that the United States intended by these passing references to boundary lines to approve the 1795 conveyance. There is nothing in the reports of the federal commissioners which supports such an intent. *American State Papers*, I *Indian Affairs*, 641-643, 663-665 (1832) (Commissioner Joseph Hopkinson reporting to Secretary of State on June 26, 1798); (Commissioner John Taylor reporting to Secretary of War on July 19, 1802).

The single purpose of both treaties was to acquire the specific lands described therein. *See* I *Journal of the Executive Proceedings of the Senate*, 273 (1829 ed.). (President Adams on May 3, 1798, appointing Hopkinson to be the federal commissioner for the purpose of holding a treaty with the Oneidas so they may "sell a part of their land" to New York); *Id.* at 408 (appointing Taylor on March 10, 1802, to negotiate with the Oneidas "for the purchase of lands in, and for the State of New York, which they are willing to sell"). Not only is there no evidence that Congress intended to validate the 1795 transaction, but on the contrary, Congress repeatedly expressed its intention both before and after the 1798 and 1802 treaties that any conveyance of Indian land be by treaty entered into as specified in the Trade and Intercourse Acts. The Court of Appeals thus correctly held that the 1795 conveyance was not subsequently approved, either implicitly or explicitly.[31]

[31] The facts that the State of New York has exercised jurisdiction over the land conveyed by the 1795 transaction and that the United States does not regard the area as Indian country are irrelevant. The Court has held that subsequent treatment of an area by other governments is relevant only when the question is whether the tribe retains jurisdiction in the face of congressional action diminishing the reservation boundaries. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1976). It cannot affect the lawfulness or validity of Indian land conveyances. Indian title can be extinguished only by "plain and unambiguous" congressional action. United States v. Santa Fe Pacific Ry. Co., 314 U.S. 339 (1941).

The authorities relied on by the Counties and the State do not authorize validation of the 1795 conveyance by implicit ratification.[32] *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960) does not sanction implied ratification as a lawful means of extinguishing Indian title. That case did not hold, as the Counties suggest, that the consent of Congress under the Trade and Intercourse Act could be "inferred" from the general terms of the Federal Power Act. It held that the Trade and Intercourse Act's requirement of federal consent did not apply to a taking by the United States under the Federal Power Act. 362 U.S. at 120. Thus, that case is not relevant to the question of the type of consent which will satisfy the requirement of the Trade and Intercourse Act.

United States v. *National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944), likewise involved the applicability of the land alienation provision of the Trade and Intercourse Act. 25 U.S.C. § 177. The court there held that the transfer of land of the Tonawanda Band of the Seneca Nation "in trust" to the State of New York under the Treaty of 1857 empowered the State to authorize the leasing of that land without the consent of the United States. 141 F.2d at 861, 863. The "understanding" of United States and State officials was relevant only as an aid in construing the scope of the State's powers.

Seneca Nation of Indians v. *United States*, 173 Ct. Cl. 912 (1965), relied solely on *National Gypsum Co.* as authority for the proposition that implicit ratification may constitute congressional approval under 25 U.S.C. § 177.

[32] Shoshone Tribe v. United States, 299 U.S. 476 (1937), did not establish the legitimacy of implicit ratification of unlawful Indian land alienation. The fact that the title of the Shoshones had been extinguished had been conceded by all parties and the only issue before the Court was the date of extinguishment. 299 U.S. at 492. Thus, *Shoshone Tribe* is not relevant to the issue presented here.

Its value as precedent, therefore, is highly questionable. Moreover, the finding of implicit ratification in the 1927 Act which acknowledged New York's ownership of the land in question was supportable primarily because the Seneca Nation had not alleged that the takings by the State were "in any respect inequitable." 173 Ct. Cl. at 916. By contrast, the Oneidas allege that the State fraudulently induced them to enter into the 1795 transaction and the Court of Appeals found that the transaction was "fraught with irregularities." 719 F.2d at 529. (J.A. at 212a).

VII. THE ONEIDAS' CLAIM DOES NOT PRESENT A POLITICAL QUESTION

The Counties and the State, in asserting that this case presents a nonjusticiable political question, attempt to pull a page from the jurisprudence of the Nineteenth Century, when any dispute over Indian lands was thought to raise a political question. *See* F. Cohen, *Handbook of Federal Indian Law*, 218 (1982 ed.). That view, long discredited, has now been "expressly laid to rest." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 413 (1980).[33]

The political question doctrine is limited to a very narrow range of cases. Political questions arise only when there exists a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially manageable standards," or overwhelming prudential considerations such as "an unusual need for unquestioning adherence to a political decision already made . . . ." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Indeed, since *Baker*, this Court has only once found a case nonjusticiable on political question grounds. *See Gilligan* v. *Morgan*, 413 U.S. 1 (1973).[34]

[33] Nor is the mere invocation of the term "political" enough to render a case nonjusticiable. This Court has repeatedly emphasized that the presence of even "significant political overtones" cannot turn a case into a political question. Immigration and Naturalization Service v. Chadha, —— U.S. ——, 103 S. Ct. 2764, 2780 (1983).

[34] The *Gilligan* case presented a paradigm political question. There the Court found that *each* of the strands of the doctrine would be violated if the courts were to review and supervise the training, orders, and weaponry of the Ohio National Guard. 413 U.S. at 8-9. By contrast, the Court has consistently rejected other political challenges since *Baker*. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969); United States v. Nixon, 418 U.S. 683 (1974); Elrod v. Burns, 427 U.S. 347 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); Immigration and Naturalization Service v. Chadha, —— U.S. ——, 103 S. Ct. 2764 (1983). *See also* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

As is demonstrated below, there has been no "constitucional commitment" of the Oneidas' claim to either Congress or the President. Neither has the Congress or the President made a decision demanding the Court's "unquestioning adherence."[35] At bottom, this case requires only that the Court interpret the Trade and Intercourse Act. "Such a determination falls within the traditional role accorded the courts to interpret the law . . . ." *Powell* v. *McCormack*, 395 U.S. 486, 548 (1969).

A. The Indian Commerce Clause Is Not A Textual Commitment To Congress

The Counties argue that the Court cannot decide this case because Congress has sole authority for resolving Indian disputes, which authority it has delegated to the President. This argument is premised on the unelaborated assertion that the Indian Commerce Clause, art. I, § 8, cl. 3, represents a "textual commitment" of exclusive authority over Indian affairs to Congress. *See* Brief of Counties at 46. This assertion, akin to arguing that the Commerce Clause deprives the federal courts of jurisdiction over cases involving interstate commerce, confuses a grant of power with a textual commitment of exclusive authority. The fact that Congress possesses some power over Indian affairs cannot mean that no other branch may act in the field. Such a principle, applicable to all congressional powers, would effectively destroy the role of the federal judiciary.

[35] Petitioners apparently recognize that the Trade and Intercourse Act provides "judicially manageable standards."

A "textual commitment" to a single branch is distinguished from a mere grant of power by the purpose of the commitment. "The non-justiciability of a political question is primarily a function of the separation of powers." *Baker* v. *Carr*, 369 U.S. at 210. True textual commitments serve to reinforce the separation of powers. *See Davis* v. *Passman*, 442 U.S. 228, 235, 236, n.11 (1979). For example, the Speech or Debate Clause is a paradigm textual commitment, *id.*; that clause directly limits Judicial and Executive interference in the legislative process. By contrast, the Indian Commerce Clause does not speak to the separation of powers at all. Its purpose was only to assert federal power as against the states. *See The Federalist, No. XLII* (Madison) (E.P. Dutton, ed., 1948) 215-16.

The Counties and the State maintain that the scope of Congress' authority under the Indian Commerce Clause is so broad as to preclude judicial construction and implementation of the Trade and Intercourse Act, a statute passed pursuant to that authority. Clearly, no one would assert that Congress' analogous power to regulate interstate commerce, arising under art. I, § 8, cl. 3, forecloses a judicial forum to those seeking to vindicate rights under statutes passed pursuant to that power. *See, e.g., Daniel* v. *Paul*, 395 U.S. 298 (1969). Similarly, it is patently unreasonable to argue that the Indian Commerce Clause commits to Congress such broad authority as to preclude judicial action in cases involving Indian land claims.

B. The Constitution Does Not Commit Authority Over Indian Land Claims To The President

Petitioners' argument that Indian affairs have been textually committed to Congress is merely a predicate for their assertion that the President possesses sole power to resolve Indian land claims. The political question doctrine would only be implicated if there were a "textually demonstrable *constitutional* commitment" to the President. *See Baker* v. *Carr*, 369 U.S. at 217 (emphasis added). Recognizing that there is no such constitutional

commitment to the President here, Petitioners suggest that a constitutional commitment to Congress and delegation to the President—by means of the Trade and Intercourse Act and the Treaty of Canandaigua—will do as well. This attempt to "bootstrap" a commitment to the President plainly fails; such an extension of the political question doctrine is wholly unwarranted.[36]

Even assuming *arguendo* that Congress does possess sole authority over Indian affairs and could delegate it, nothing in the Trade and Intercourse Act or the Treaty of Canandaigua commits *sole* remedial discretion to the President. *Cf. Luther* v. *Borden*, 7 How. 1 (1849). At most, Congress has given the President *some* power to act; the Trade and Intercourse Act, for example, provides that "it shall . . . be lawful for the President to take [remedial] measures . . . ." 1793 Act, § 5. This is hardly a compelling commitment of exclusive authority. Nowhere else is there any indication that Congress has delegated exclusive authority in this area to the President, and this argument must fail.

C. Prudential Considerations Do Not Suggest That This Case Involves A Political Question

In certain instances "prudential" considerations, such as the need for "unquestioning adherence" to a presidential decision, or a fear of embarrassment from "multifarious pronouncements" from different branches, counsel against judicial resolution of a controversy. *See, e.g., Gilligan* v. *Morgan*, 413 U.S. 1 (1973). Failing to demonstrate that there has been a textual commitment to one of the political branches, Petitioners attempt to force

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[36] Luther v. Borden, 7 How. 1 (1849), apparently found commitment to the president through a delegation of congressional power. Needless to say, that case was decided more than a hundred years before the modern political question doctrine was articulated in Baker v. Carr, *supra*. Moreover, the Court in *Luther* was centrally concerned with the lack of judicially manageable standards for determining which was the lawful government of Rhode Island.

this case into the prudential considerations mold by appealing to issues not before the Court.

The Counties intimate that so-called "tribal governance" issues somehow render this case nonjusticiable. Brief of Counties at 47-49. However, these issues are simply not before this Court. As the Court of Appeals noted, the only question presented here is the liability of the Counties and the State, not the allocation of damages among the Oneidas. 719 F.2d at 539 (J.A. at 234a-235a).[37] Neither is this a case like *Luther* v. *Borden*, 7 How. 1 (1849), in which the resolution of the substantive claim depends on a judicial determination of sovereignty. The Counties' substantive liability under the Trade and Intercourse Act is unrelated to which group constitutes the proper tribal authority.

Undoubtedly, a political question may be involved when there is "an unusual need for unquestioning adherence to a political decision already made . . . ." *Baker* v. *Carr*, 369 U.S. at 217. Here, however, no such decision has been made. Sixteen years ago the Interior Department declined to bring an action on behalf of the Oneidas for the sole reason that the Oneidas had a claim pending before the Indian Claims Commission. *See* J.A. at 44a. This action did not constitute a political evaluation of the merits of such litigation nor a political decision that the consequences were too forbidding. The only apparent consideration was the conservation of governmental resources. Such a determination does not touch the concerns of the political question doctrine.[38]

[37] Surprisingly, the Counties cite Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), for the proposition that the Court cannot "allocate[e] . . . tribal property." Brief of Counties at 48. In fact, that case specifically rejected the notion that the political question doctrine immunized the allocation of tribal property from equal protection review.

[38] Quite simply, the Interior Department did not find that the courts should not decide the Oneidas' claim, but only that Interior would not prosecute it. The Court is not asked here to review Interior's decision not to prosecute.

Even if the Executive had made a "political decision" on the issue presented here, there is no "unusual need" for "unquestioning adherence" to that decision. *See Baker* v. *Carr*, 369 U.S. at 217. It is in the field of foreign relations that questions may "uniquely demand single-voiced statements of the Government's views." *Id.* at 211.

This Court in recent years has consistently rejected political question attacks on the justiciability of Indian land cases. *See Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73 (1977); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980); *cf. Baker* v. *Carr*, 369 U.S. at 215-16.[39] The lower courts have, without exception, followed suit with respect to Eastern Indian land claims.[40] As the Court noted earlier in this litigation, "federal law *and federal courts* must be deemed the controlling considerations in dealing with Indians." *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. at 678 (1974) (emphasis added).

Recognizing the weakness of their substantive political question arguments, the Counties rely largely on predictions of disruption and chaos if this case is decided on the merits. It is intimated that the Court should decline to tread where such possibilities loom, no matter

[39] Although *Delaware Tribal Business Comm.* and *Sioux Nation* both involved constitutional attacks on congressional action, the Court has also decided suits requiring only treaty construction without finding a political question bar. *See, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

[40] *See, e.g.*, Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070 (2d Cir. 1982); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F.Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975); Short v. United States, 661 F.2d 150 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1034 (1982); Covelo Indian Community v. Watt, 551 F.Supp. 366 (D.D.C. 1982); Narragansett Tribe of Indians v. Southern Rhode Island Development Corp., 418 F.Supp. 798 (D.R.I. 1976).

how speculative. The Court has sufficiently answered such suggestions:

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment and conscientiously to perform our duty.

Immigration and Naturalization Service v. *Chadha*, —— U.S. ——, 103 S. Ct. at 2780, *quoting Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821). This the courts have done in a remarkable range of cases involving far more intractable and complex problems than the present litigation. *Cf. Reynolds* v. *Sims*, 377 U.S. 533 (1964) (reapportionment); *Arizona* v. *California*, 373 U.S. 546 (1963) (water rights); *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (desegregation). In the end, the Counties are reduced to claiming that the injury to the Oneidas is too severe to permit relief. As the Second Circuit has aptly responded:

> [W]e know of no principle of law that would relate the availability of relief inversely to the gravity of the wrong sought to be redressed.

Oneida Indian Nation of New York v. *State of New York*, 691 F.2d at 1083 (2d Cir. 1982).

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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